No. 80-2085

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

GERIATRICS, INCORPORATED
doing business as
EVENTIDE OF LAKEWOOD NURSING HOME,
Petitioner,

vs.

RICHARD SCHWEIKER, Secretary of the United States Department of Health and Human Services,
DARREL MUHR, Regional Health Standards and Quality Director, United States Department of Health and Human Services,
COLORADO DEPARTMENT OF HEALTH
and
FRANK TRAYLOR, M.D.,
Executive Director of the Colorado Department of Health;
COLORADO DEPARTMENT OF SOCIAL SERVICES
and
ARMANDO ATENCIO, Executive Director of the Colorado Department of Social Services;
JEFFERSON COUNTY DEPARTMENT OF SOCIAL SERVICES
and
NELSON L. NADEAU, Director of the Jefferson County Department of Social Services;
and
STUART G. BARR, a Hearings Officer of the State of Colorado,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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INTRODUCTORY STATEMENT

The State of Colorado accepts the petitioner's statements regarding the parties, the decision below, jurisdiction and the pertinent constitutional, statutory and regulatory provisions.

QUESTIONS PRESENTED FOR REVIEW

1. Does a nursing facility have a property interest in its certification or its provider agreement under federal or state law?

2. If a property interest exists, must the facility be afforded an evidentiary administrative hearing prior to the termination of certification and reimbursement by the federal government pursuant to the medicare programs?

3. If a property interest exists, must the facility be afforded an evidentiary administrative hearing by the state government pursuant to medicaid statutes and regulations when, pursuant to federal regulations, a decision to decertify a nursing home is binding upon the state for purposes of medicaid?

4. Pursuant to Colorado law, is a provider agreement considered as an equivalent to a license?

SUPPLEMENTAL STATEMENT OF FACTS

The statement of the case offered by plaintiffs fails to fully set forth the factual circumstances material to the consideration of the questions presented. At the time that this case was heard on the motion for temporary restraining order, Geriatrics, Inc. owned, leased or operated approximately sixty-four nursing homes, including Eventide of Lakewood. Eventide's operating license, certification and its medicare and medicaid provider agreements were all due to expire in August 31, 1979. Pursuant to state and federal regulation, the Colorado Department of Health, as the desig-

nated survey agency, conducted a complete survey of Eventide on May 15 and 16, 1979. The purpose of the survey was to ascertain whether the certification, provider agreements and the state license to operate, should be renewed. The survey found several serious deficiencies in the areas of infection control and nursing services. These and other deficiencies were detailed in a thirty-seven page deficiency list. The deficiency list was furnished to Eventide, and Eventide responded with a proposed plan of correction. After reviewing the proposed plan of correction, and previous difficulties with the facility, the Colorado Department of Health notified Eventide by a letter dated July 27, 1979, that it did not intend to renew its license and certification and that it was recommending to the Department of Health and Human Service and the Colorado Department of Social Services that they refuse to renew Eventide's medicare and medicaid provider agreements, respectively.

On August 1, 1979, Health and Human Services notified Eventide that its medicare provider agreement would not be renewed. Pursuant to 42 C.F.R. 442.20 the state was required to terminate its medicaid provider agreements. On August 9, 1979 the Department of Social Services notified Eventide that it was not renewing its medicaid provider agreement. Geriatrics timely appealed these actions.

A hearing was set by the state on the matters of the license, medicaid certification and the provider agreement for August 27, 1979. A state hearing officer granted a stay with regard to the license and certification but refused a stay with regard to the provider agreement. As a result of the failure to continue the medicaid provider agreement, this action was commenced.

At the hearing on Eventide's motion for a temporary restraining order, David A. Kremser, then executive vice president in charge of finance for Geriatrics, Inc., testified that approximately 116 of the facility's 137 residents were receiving medicare. Mr. Kremser also testified that Geriatrics was losing $15,000 per month and that the potential loss of revenue if medicaid patients were removed was $37,000

per month. He also stated that Geriatrics, Inc. could continue to operate even if medicaid patients were removed from Eventide of Lakewood.

After evidence was heard, the trial court enjoined the agencies from terminating funding until a hearing was conducted to establish the status of the home's compliance with the pertinent regulations. He also ordered that the home be allowed to continue to admit medicaid and medicare patients.

In October 1980, the state and Geriatrics reached an agreement under which Geriatrics agreed to divest itself of the facility. Geriatrics relinquished the facility to a new owner, effective February 1981.

ARGUMENT

I.

THE QUESTION OF WHETHER A PRETERMINATION HEARING SHOULD BE GRANTED HAS BEEN ANSWERED BY THIS COURT.

This case is governed by *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972). The facts and analysis contained in *Board of Regents of State Colleges v. Roth* support Colorado's position that Geriatrics does not have a protectable property interest. In *Roth*, a teacher was hired as a non-tenured assistant professor at a Wisconsin university for a fixed term of one year. He completed the year but was not rehired for the following year. The university did not give a reason for its refusal to rehire, and it did not provide an opportunity for a hearing. This Court noted that the range of due process was not infinite and that to determine whether a property interest exists, the nature of the interest, rather than its weight, must be scrutinized. *Board of Regents v. Roth*, 408 U.S., at 571. Generally, the fifth and fourteenth amendments protect interests that a person has *already acquired*. *Board of Regents v. Roth*, 408 U.S., at 576. The court concluded that Roth's original appointment secured no interest in reemployment for the next year and that he did not have a property interest.

In this case, federal law limits provider agreements to one year. 42 U.S.C. 1395cc(a)(1); 42 C.F.R. section 442.15(a). In order to renew a provider agreement, a facility must be inspected annually to assure compliance with federal standards. 42 C.F.R. 442.12, (1980); 42 C.F.R. section 442.201 (1980) and 42 C.F.R. 456.606 (1980). A close reading of the federal law shows that there is no "already acquired" interest in renewal. The clear intent of limiting the provider agreement to one year is to terminate the contract, survey the facility to determine compliance with conditions of participation and to enter into a new agreement with the facility if the facility is in compliance with conditions of participation. Thus, Geriatrics does not have a property interest.

This Court has held that medicaid and medicare are entitlements for the patient. The entitlement belongs to the patient. The home, as a third party, has no privity to any constitutional or statutory due process rights that may accrue to its patients. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 786-790 (1980). Further, in *dictum*, the Court noted that a nursing facility does not have a right to a pretermination hearing by virtue of its provider agreement. *O'Bannon v. Town Court Nursing Center*, 447 U.S., at 785 fn 17. If the facility does not have an entitlement under either medicaid or medicare statutes or regulations, then it does not have a property interest.

Even assuming there is a property interest, this case is governed by *Mathews v. Eldridge*, 424 U.S. 319 (1976). In *Mathews*, the Court listed three factors that must be considered to determine whether there is a right to a pretermination hearing:

1. the private interest that will be affected by the official action;

2. the risk of erroneous deprivation of such interest through the procedure used and the probable value of additional safeguards;

3. the government's interest.

Clearly, the private interest herein is substantially less than for a physically disabled worker as is the hardship imposed by any erroneous deprivation. The facility does not have the same brutal need, and given the fact that Geriatrics owns sixty-four homes, it can hardly be said that one home will cause a significant hardship to the plaintiff. Finally, as noted in *O'Bannon*, the government has a significant interest in providing assurances of quality of care.

II.

NO REAL DIVISION EXISTS AMONG THE CIRCUITS WITH REGARD TO THE RIGHT TO A PRETERMINATION HEARING.

There is a commonality that runs through all of the cases cited by Geriatrics. All of the cases used a balancing test similar to that used in *Mathews v. Eldridge, supra.* All of the cases concluded that some process is due to a facility that is about to be decertified. None concluded that a pretermination hearing is due, where there are some procedural safeguards prior to the effective date of the action.

Geriatrics maintains that the tenth circuit's decision conflicts with decisions from other circuits. In its petition, Geriatrics intimates that the cited cases stand for the proposition that a pretermination hearing must be granted to providers. In fact, none of the cases, cited by Geriatrics supports its contention. The first case cited by Geriatrics is *Maxwell v. Wyman,* 458 F.2d 1146 (2d Cir. 1972). The underlying issue in *Maxwell* was whether a preliminary injunction should be issued pending a decision on whether New York State properly interpreted federal Life Safety Code waiver provisions. *Maxwell v. Wyman,* 458 F.2d at p. 1150. *Maxwell* cited three reasons for granting a pretermination hearing.

1. The Department of Social Services had misinterpreted federal law. Consequently its broad-based denial of waivers was an abuse of discretion.

2. Temporary waivers had been in effect for a period of time. It did not appear that there was imminent danger to the residents.

3. A change in federal regulations created substantial confusion.

Maxwell did state in *dictum* that ineligibility for a provider agreement "may make the state operating certificate,

concededly still outstanding useless." *Maxwell v. Wyman* at p. 1151. A later New York case specifically held that non-renewal of a provider agreement was not a limitation on an operating certificate. *Schwartzberg, et al. v. Whalen,* 66 A.D.2d 881, 411 N.Y.S.2d 667 (1978). The New York court, interpreting New York law, stated:

> Moreover, we hold that the termination of the Petitioners medicaid provider status is not a limitation of their operating certificate cognizable under section 2806 of the Public Health Law. The issuance of an operating certificate does not insure medicaid provider status. An operating certificate is merely a general license to conduct a nursing home. Separate Federal qualification must be met for provider status. Therefore, the State's refusal to renew the Medicaid provider agreement, pursuant to HEW's directions, cannot be equated with an actual limitation of the operating certificate for violations of Public Health Law. Consequently, no hearing is required.
>
> We note that the possible success of the limitation argument, which the Court in *Maxwell v. Wyman,* 2 Cir, 458 F2d 1146, 1151. Most cases cited were before *Mathews v. Eldridge,* speculated on, has *not been* borne out. Thus, the Petitioner's reliance is misplaced. *Schwartzberg v. Whalen,* 411 NYS 2d, at 668.

Thus, given the interpretation of the New York State court, *Maxwell v. Wyman* no longer retains any relevance or authority.

Geriatrics cites *Case v. Weinberger,* 523 F.2d 602 (2d Cir. 1977), in support of its contention that Geriatrics is entitled to a pretermination hearing. The conclusions drawn by Geriatrics from *Case* are incorrect. The Court did not hold that nursing facilities are generally entitled to a pretermination hearing; rather, it held that recipient should be entitled to a pretermination hearing. The *Case* court unequivocally found that the nursing facility interest was only incidental to the program and, at best, a business rela-

tionship. *Case v. Weinberger*, 523 F.2d at 607. The *Case* court did not deny a pretermination hearing because the conditions jeopardized the patients. *Case* stated that "(w)e need not decide here whether the conditions were so hazardous as to justify summary action." *Case v. Weinberger*, 523 F.2d at 607. Instead, it determined that no pretermination hearing was necessary because a sufficient review had occured.

Geriatrics also cites the case of *Hathaway v. Mathews*, 546 F.2d 226 (7th Cir. 1976). *Hathaway* is inapposite. In *Hathaway*, the facility received no notice of any proposed adverse action and did not have an opportunity to review the matter with any of the authorities prior to the proposed action. Compare to *Case v. Weinberger, supra*. The *Hathaway* court employed a balancing test and determined that, given the peculiar circumstances of the case, a pretermination hearing should be given.

Finally, Geriatrics cited *Caton Ridge Nursing Home v. Califano*, 447 F. Supp. 1222 (D. Md. 1978), *aff'd*, 596 F.2d 608 (4th Cir. 1979). All *Caton Ridge* stands for is the proposition that some process is due to a facility which is about to be decertified.

It is also important to note that the survey process is not significantly different from the process used to determine medical disability under Social Security as outlined in *Mathews v. Eldridge*. The standards are clearly set out in statute and regulation. Thus, even if there is a property interest, no pretermination hearing is required.

III.

THE PROVIDER AGREEMENT DOES NOT CREATE A DIRECT RELATIONSHIP BETWEEN THE PROVIDER AND THE GOVERNMENT.

The provider agreement is merely a device which the government generally uses to evidence that a nursing facility is qualified to care for medicare or medicaid patients. This is clearly stated in 42 C.F.R. 442.12-442.30. Geriatrics has not cited one federal statute or regulation which entitles it to more than a unilateral expectation of a property in-

terest. The fact that the provider agreements are limited to one year by statute and regulation and are subject to certification surveys conclusively prove that there was no more than unilateral expectation of a property interest.

Geriatrics cannot find support in Colorado law for its claim of a property interest. Colorado law denies property status to the provider agreement. C.R.S. 1973, 26-4-110(1) states:

> The state department shall establish rules and regulations for the payment of vendors under this article. Within limits of available funds, such rules and regulations shall provide reasonable compensation to such vendors, but no vendor shall, by this section or any other provision of this article, be deemed to have any vested right to act as a vendor under this article...

Thus, the state law argument, as presented by Geriatrics, is unfounded.

CONCLUSION

For the above stated reasons, the petition for writ of certiorari should be denied.

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